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No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 137–141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159–164) is reported at 155 F. 2d 711.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1946 (R. 159). A petition for rehearing was filed on June 17, 1946 (R. 165–169), and denied on July 8, 1946 (R. 169). The

petition for a writ of certiorari was filed on October 3, 1946, and granted on November 12, 1946 (R. 170). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. One of the employees had always been paid on a salary basis; the remaining two had previously been paid on an hourly basis. In the negotiations concerning the amounts of the salaries, consideration was given, *inter alia,* to the hourly rates previously paid. The question presented is whether respondent's failure to pay the employees compensation in addition to their salaries for hours worked in excess of the statutory maximum violates Section 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT

Respondent, an Ohio corporation, was engaged in the manufacture of metal and plastic products, substantially all of which were regularly distributed in interstate commerce (R. 5, 20). Respondent generated its own power and employed three operating engineers, in addition to a chief engineer, to man the power plant (R. 137, 149). This case relates to the three operating engineers whose duties included maintaining the machinery in proper operation by packing, wiping, oiling, making emergency repairs and minor adjustments, reading gauges, listening for sounds of disorder, and reporting to their immediate superior any breakdown for which they were unable to provide (R. 149).

The Administrator's complaint alleged violations of the overtime provisions of the Act with respect to these employees (R. 5–7, 10). Respondent answered that its covered employees who did not receive overtime compensation in accordance with the requirements of the Act were exempt as executive or administrative employees under Section 13 (a) (1) and the Administra-

tor's regulations (R. 20–21). The Administrator's regulations provide, among other requirements, that an employe must be compensated "on a salary basis" to qualify for the exemption (R. 134).[1] The district court concluded that the three engineers were employed as executives and therefore exempt from the provisions of the Act (R. 152). On appeal, it was held that the engineers were not exempt because the findings of the district court, that they directed the work of other employees and customarily exercised discretionary powers (R. 149–150), were not sustained by the evidence (R. 162). The denial of an injunction was affirmed, however, on the ground that the employees were compensated for overtime employment in accordance with the requirements of the Act (R. 164).

The district court found that all three engineers were "compensated on a salary basis" (R. 145, 146, 147). One of them, Stegman, apparently had always been paid on that basis (R. 147, 67).[2] The two other engineers, Page and Spooner, had been paid an hourly rate of 80 cents an hour until February 1941 when they were placed on a month-

[1] Payment "on a salary basis" is necessary to qualify an employee for exemption as an "executive." An "administrative" employee, to qualify for an exemption, must be paid "on a salary or fee basis" (R. 134).

[2] Stegman had been the chief engineer but relinquished that position for health reasons (R. 64).

ly salary[3] (R. 145–147, 95, 99–100, 107). Prior to the time Page and Spooner were placed on a salary basis, negotiations were conducted to reduce their hours[4] and to fix the amount of the salary. The district court found that as a result of these negotiations it was agreed "that they [the engineers] would be compensated on a monthly salary basis, sufficient in amount to compensate them under the Fair Labor Standards Act for regular and overtime employment at the regular hourly rate of pay they were receiving prior to February 1, 1941" (R. 150). The salaries, however, were not based on and did not purport to incorporate any regular and overtime rates but merely took into consideration the hourly rate previously paid as one of many factors in the negotiations (R. 100–101). When the salary rate was negotiated, respondent admittedly "took the engineers off of the hourly rate" (R. 95). The monthly salary was a mere approximation, not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). The salaries actually agreed upon and paid were less than the em-

[3] The district court found that the change took place on February 1, 1941 (R. 150), but the collective bargaining agreement, on the basis of which the change went into effect (R. 95), was entered into on March 10, 1941 (Ex. J).

[4] According to the testimony of respondent's counsel, these two engineers "had been working an average of about 56½ or 57 hours per week" (R. 95).

ployees would have earned if they had been based on the 80-cent hourly rate for a 51-hour week.[6] On the basis of 80 cents an hour for 40 hours and $1.20 per hour for 11 hours the monthly salary would have been $195.87,[6] as contrasted with the $185.00 paid Page, the $180.00 paid Spooner, and the $190.00 paid Stegman.[7]

[5] The salaries were subsequently increased. The various salaries paid to the three engineers were as follows (R. 145–147):

	Feb. 1, 1941–Apr. 1, 1941	Apr. 1, 1941–Aug. 1, 1941	Aug. 1, 1941–Mar. 10, 1942	Mar. 10, 1943–Dec. 31, 1944
Stegman	$190.00	$190.00	$190.00	$205.00
Page	185.00	185.00	195.00	210.00
Spooner	180.00	185.00	195.00	210.00

The scheduled workweek of Page and Spooner was 51 hours (R. 41, 45, 56, 95) but respondent's payroll records (Exs. 4, 5, M, N) show that they occasionally worked as few as 33½ hours and sometimes as many as 59½ hours a week (R. 120, 128). Stegman apparently worked shorter hours than the other two operating engineers (R. 65).

[6] The compensation may be shown as follows:
($0.80×40 hours) + ($1.20×11 hours)=$45.20 per week;
(45.20×52 weeks)÷12 months=$195.87.

[7] The district court's finding that the amount of the salary was "more than the amount which they [the engineers] would have earned at the regular hourly rate of Eighty Cents (80c) per hour paid prior to February 1, 1941, plus overtime pay under the Fair Labor Standards Act at the rate of time and one-half the regular hourly rate of pay for the scheduled work week of fifty-one (51) hours per week" (R. 150) is erroneous. Nevertheless, implicit in the finding is the district court's recognition that there was not an actual translation of the old hourly rates into the newly fixed salaries.

A more plausible explanation of the amounts paid to Page and Spooner is that they were based on a straight rate of 83

In 1944, shortly after respondent's plant was inspected by representatives of the Wage and Hour Division and the executive exemption issue was raised (R. 9–15), the engineers were asked whether they "wanted to go back on the hourly basis or still stay on the salary" (R. 54).[5] They elected the latter and on July 25, 1944, signed an agreement which provided (R. 151):

> We the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges *and continue on a salary basis.* [Italics supplied.]

Respondent's witnesses testified that the employment contracts did not provide a fixed hourly rate because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees, they were supervisory employees, and that under the law they were not entitled to time and a half" (R. 101).

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cents an hour for a 51-hour week. The agreement entered into on March 10, 1941 (Ex. J), provided a 3 cent hourly increase for respondent's employees which, added to the hourly rates the two engineers were then receiving, would have given them an hourly rate of 83 cents. This rate multiplied by 51 scheduled hours results in a weekly salary of $42.33 which is equivalent to a monthly salary of $183.43 ($42.33 per week × 52 weeks = $2201.16 per annum ÷ 12 months = $183.43 per month). The latter sum is closer to the $185.00 given to Page and the $180.00 paid to Spooner than the sum of $195.87.

[5] At the time of the inspection respondent furnished to representatives of the Division a list of its employees claimed to be exempt from the Act (R. 24–25). This document classifies Page and Spooner as "employees receiving additional straight time" for 48–53 hours a week, and lists Stegman under the heading "no overtime" (Ex. 1).

None of the employees in question was ever paid compensation for overtime in addition to his salary except that, during the period from June 1, 1943, to December 15, 1943, Page and Spooner received "straight-time overtime pay for hours worked in excess of 49 hours per week, up to a maximum of 53 hours per week" and from December 15, 1943, to December 31, 1944, for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week (R. 146, 147).[9] The straight-time rates for the latter period were computed by reducing the monthly salary to its weekly equivalent and dividing the weekly wage by 46.[10]

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[9] The avowed purpose of these straight-time payments was to increase the employees' salaries which were then limited by the wage stabilization regulations. The district court found that the payments were made "pursuant to express approval from the Salary Stabilization Unit of the United States Treasury Department under the wage stabilization provisions of the Emergency Price Control Act of 1942, based on a finding by the Salary Stabilization Unit that it was permissible for the defendant to pay such straight-time overtime as a salary increase for an exempt employee under the Fair Labor Standards Act" (R. 146–147). The Treasury Department, of course, did not purport to rule, on the applicability of the Section 13 (a) (1) exemption to these engineers.

[10] The "straight-time rate" appearing on respondents' payroll records for 1944 (Exs. 4, 5, M, N) is $1.054. This amount equals exactly the monthly salary ($210.00), multiplied by 12 (months), divided by 52 (weeks), and divided by 46: $\frac{210\times 12}{52\times 46}=1.054$

The district court made no finding and the record contains no evidence that any hourly rate was ever agreed upon or otherwise specified, either orally or in writing, during the period in question, other than the "straight-time rate" for hours in excess of 49 and later 46. The latter rate is the only hourly rate appearing on the payroll records introduced by respondent at the trial (Exs. M, N). The individual engineers testified that they had never been told that their salaries included overtime (Page, R. 46; Spooner, R. 57; Stegman, R. 66), or were made up of any hourly rate (Page, R. 46; Spooner, R. 57).

The circuit court of appeals held that "appellee has compensated its non-exempt employees for overtime employment in accordance with the requirements of the Act" (R. 164). It based this conclusion on the ground that the monthly salaries were "figured in a shift from hourly pay to monthly salary, at 80 cents an hour, which was the amount they [the engineers] would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time

their salary includes an allowance of one-and-one-half pay for overtime" (R. 164).

SPECIFICATION OF ERRORS

The court below erred

1. In holding that the monthly salaries paid by respondent to its operating engineers included overtime compensation in accordance with the requirements of Section 7 of the Fair Labor Standards Act.

2. In treating the 80-cent hourly rate, paid to two of the engineers before the shift to a salary basis, as their "regular rate of pay" within Section 7, even though this rate was not specified or agreed upon by the parties and was not in fact used to determine the engineers' compensation.

3. In affirming the judgment of the District Court which denied petitioner's prayer for an injunction.

ARGUMENT

RESPONDENT DID NOT PAY ITS OPERATING ENGINEERS THE OVERTIME COMPENSATION REQUIRED BY THE ACT

In holding that respondent has compensated its operating engineers in accordance with Section 7 of the Fair Labor Standards Act, the court below regarded their monthly salaries as including overtime compensation on the basis of a "regular rate" of 80 cents an hour which was the hourly rate paid to two of the engineers prior to the "shift from hourly pay to monthly

salary" (R. 164). The decisions of this Court unequivocally establish that the amount of wages paid and the method of compensation actually employed determine the "regular rate" for purposes of Section 7. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419. It is clear in the instant case that the monthly salaries agreed upon and actually paid the engineers in fact determined their compensation for their basic workweek of 51 hours.[11] The 80-cent hourly rate used by the court below to support its conclusion that overtime compensation was paid (1) was not agreed upon by the parties or specified in their contracts (*Missel* case, *supra*), and (2), in any event, did not in fact determine and was never used in calculatig the employees' compensation "for the normal, non-overtime workweek." *Youngerman-Reynolds* case, *supra* at 424; *Harnischfeger* case, *supra*.. It follows, therefore, that the monthly salaries should have been used to ascertain the regular rate in accordance with the formula adopted by this Court in the *Missel* case, and that the court below disregarded well established principles in holding otherwise.

[11] As we have shown, *supra*, p. 8, the monthly salaries were subsequently paid for workweeks of 49 and then 46 hours.

1. THE 80-CENT HOURLY RATE WAS NOT SPECIFIED OR AGREED UPON BY THE PARTIES AS THE "REGULAR RATE"

The holding of the court below that a salary may be interpreted to include overtime compensation, even in the absence of specification of hourly or overtime rates by the parties, is in conflict with the *Missel* and other decisions of this Court under Section 7. In the *Missel* case, this Court held that payment of a salary for a variable number of hours in excess of the statutory maximum, without additional compensation for overtime hours, did not comply with Section 7.[12] The "weekly guaranty" plan in *Walling* v. *Belo Corp.*, 316 U. S. 624, was upheld as a contract which "specifies a basic hourly rate of pay" (p. 634). The *Missel* case was distinguished on the ground that "in the contract in that case, there is no stated hourly wage and no provision for overtime" (*Belo* case, p. 634). See also *Missel* opinion, at p. 581. The contract in the instant case, therefore, which provided only for a salary, is clearly governed by the *Missel* rule.

At the time respondent's plant was inspected, it expressly recognized that the three engineers were paid "on a salary basis" (R. 151) and were not being paid additional compensation for statutory overtime (Ex. 1 discussed in note 8, *supra*).

[12] During the following term this Court applied the *Missel* rule to employees working a *fixed* number of hours. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Floyd* v. *DuBois Soap Co.*, 317 U. S. 596.

Although the 80-cent hourly rate, previously paid to Page and Spooner, was apparently one of the factors considered in negotiating their salaries early in 1941, there is no evidence in the record that this rate or any other hourly rate was specified by the parties in the employment agreement or agreed upon either orally[13] or in writing. On the contrary, the uncontradicted testimony of the engineers is that they were never advised that their monthly salaries included overtime compensation or were "made up of any hourly rate" (R. 46, 57). Although respondent's attorney testified that the monthly salary negotiated in February 1941, "contemplated regular time pay and regular overtime for the work which was agreed on at that time" (R. 97), he further testified that when the salary was negotiated for the engineers, "we took the engineers off of the hourly rate" (R. 95) and that a fixed hourly rate was not provided because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees * * * and that under the law they were not entitled to time and a half" (R. 101).

The foregoing indicates that, even when the engineers were originally placed on a salary basis,

[13] Respondent's assumption that the Administrator bases his case on the fact that "the contract between the Respondent and its engineers governing their hourly rate of pay was not in writing" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 6) misconceives the Administrator's position.

the 80-cent hourly rate assumed by the court below was not a part of their contract. There can be no doubt that the 80-cent rate was not a part of their contract at the time this action was instituted more than three years later after their salaries were substantially increased. Although there is evidence that the hourly rate in effect at the time of the shift to a salary was one of the factors in arriving at the amount of the salary, there is not the slightest suggestion in the record that the increased salaries being paid at the time of suit were based upon any hourly rates. In fact, it is clear from the application of an agreement negotiated between respondent and the union representing its employees that the engineers were regarded as salaried and not hourly rate employees (Ex. J). This agreement provided for a 10-cent per hour increase for hourly rate employees and for an "increase in pay of fifteen dollars ($15.00) per month effective retroactive to March 10, 1942" for "each salaried employee". The record shows that the engineers received the $15 monthly increase as of March 10, 1942 (R. 145–147). Obviously it is not the function of the courts to allocate this or the other salary increases paid the engineers to regular time and overtime. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. As stated in the concurring opinion of Mr. Justice Frankfurter: "It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corre-

sponded with the actual arrangement, could satisfy the statute" (p. 434). That the salary alone was considered the basis of the engineers' compensation is further evidenced by the fact that, when the application of the exemption was first placed in issue by Government representatives, respondent proceeded to obtain a written agreement from the engineers "to be regarded as Foremen * * * and continue on a salary basis" rather than return to an hourly rate (R. 54, 151).

Since it is clear that the only element of compensation agreed upon was the salary, respondent can claim at most that there was a general intent, without specification of rates, to have the salary include overtime. Even this is doubtful in view of respondent's admission that it assumed the engineers were exempt employees who were not entitled to overtime compensation (R. 101). As already indicated, in the absence of specified hourly and overtime rates, an agreement for a straight monthly salary will not be construed to include overtime pay. *Overnight Motor Co.* v. *Missel, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra; Floyd* v. *Du Bois Soap Co., supra.* Even where an intention to have the compensation paid include overtime has been made clear by the specification in the contract of regular and overtime rates, this Court has held that the daily wage or a piece rate, in fact employed, did not include overtime. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Harnischfeger Corp., supra;*

Walling v. *Youngerman-Reynolds Hardwood Co.*, *supra*. The circuit courts of appeals have consistently interpreted the *Missel* decision as holding that, notwithstanding an intention to have the salary include overtime compensation, a contract for a work-week longer than the statutory maximum, which does not specify hourly rates, violates the overtime requirements of the Act. *Walling* v. *Stone*, 131 F. 2d 461, 463 (C. C. A. 7); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359, 362 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. 2d 826 (C. C. A. 10); *Walling* v. *Helmerich & Payne*, 138 F. 2d 705, 707 (C. C. A. 10);[14] *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied, 327 U. S. 777; see also *Adams* v. *Union Dime Savings Bank*, 144 F. 2d 290 (C. C. A. 2), certiorari denied, 323 U. S. 751. In *Walling* v. *Stone*, *supra*, at 463, "the court found that the defendants and their employees intended that the fixed weekly rates of compensation cover regular and overtime work." The Circuit Court of Appeals said that "Even so, that alone would not be sufficient to comply with the Act; such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, *Missel* case, *supra*" (p. 463). The court in the *Seneca Coal* case stated that even if

[14] This issue was not before this Court in its review of the case, 323 U. S. 37, as the circuit court of appeals decided this aspect of the case favorably to the Administrator, and the Company did not seek review.

"the parties believed in good faith that * * * the employment contract was in compliance" with the Act, "this belief was not based upon an express agreement concerning a regular or basic hourly rate" (at p. 363). In the absence of such an agreement, the specified salary must be regarded as the controlling element in the compensation scheme, and under the *Missel* rule the regular rate is computed by dividing the salary, reduced to a weekly basis, by the number of hours for which it was paid.

2. THE 80-CENT HOURLY RATE WAS NOT IN FACT USED IN CALCULATING THE ENGINEERS' COMPENSATION.

Not only does the record show that the 80-cent rate was not agreed upon or specified as such by the parties, but it affirmatively establishes that this rate was never in fact used to compute the engineers' compensation. Thus, even if the 80-cent rate had been specified in the contract, it should not be given effect as the regular rate for statutory purposes. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Youngerman-Reynolds, supra; Walling* v. *Harnischfeger, supra.* The circuit court of appeals, in finding compliance with the overtime provisions of the Act, assumed that the salaries were "figured * * * at 80 cents an hour, which was the amount they [the engineers] would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time and one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled

workweek of 51 hours" (R. 164). As pointed out in the Statement, *supra*, a simple arithmetical calculation disproves the accuracy of this assumption. Had the salaries been calculated on the basis of 80 cents per hour for 40 hours and $1.20 an hour for 11 overtime hours, they would have been $195.87.[15] Yet Page's monthly salary was fixed at $185.00, Spooner's at $180.00, and Stegman continued to receive the $190.00 a month which he had been paid prior to that time. The very fact that each of these employees received a different salary for what the court below assumed to be the same workweek[16] indicates that the 80-cent rate was not employed in calculating the salaries. Obviously, the same rate could not have been used to arrive at three different results. The failure to translate the prior hourly rate into the salaries was indeed admitted by respondent's counsel who testified that the salaries were not "figured exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101).[17]

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[15] See *supra*, p. 6.

[16] This assumption is not supported by the record as to Stegman who apparently worked a shorter shift than the other two engineers (R. 65).

[17] Respondent suggests (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 7) that "The conversion, made in accordance with the agreement, although not originally mathematically correct was made so in August, 1941, when the Page and Spooner salaries were raised to $195 per month for the reasons stated by Mr. Glen O. Smith as follows:

"A. Well, I wouldn't want to say postively. Of course, the reason we made it $195 in August is because you add and

The district court also stated that "it is not the company's contention that if these salaries are transposed to wages and figured upon a basis of base pay plus time and a half for over time it would work out exactly. This was a figure reached in the course of bargaining" (R. 101).

The salaries paid at the time of suit were likewise wholly unrelated to the rate adopted by the court below. The district court found that Stegman was paid a salary and that Page and Spooner received salaries with "no compensation for overtime in addition to his salary" except overtime at straight-time rates for hours worked in excess of 46 per week (R. 145–147). At the time of suit the latter two engineers were paid salaries of $210 per month and Stegman, $205 (R. 145–147). Application of the hourly rate of 80 cents assumed by the court would have equalled $195.87 per month on the basis of a 51-hour week [18] and $169.87 per month on the basis of a 46-hour

subtract and multiply and get $195. The reason we made it $195 in August was because the union demanded it and got it.' (R. 103.)"

The above testimony can hardly be characterized as supporting respondent's assertion. In any event, there still remains a discrepancy between the raised salary ($195.00) and the amount arrived at on the basis of an 80-cent hourly rate ($195.87). Moreover, the $195.00 salary was paid to only two of the engineers, was in effect for only 8 out of the 47 months involved in this suit, and was not in effect at the time this action was instituted.

[18] See note 6, *supra*.

week.[19] The discrepancy between these amounts and the salaries of $210 and $205 actually paid is conclusive evidence that the salaries were not predicated upon the assumed hourly rate.

It is also evident from the compensation paid in non-standard workweeks that the 80-cent rate was never applied. Contrary to the lower court's statement that "it is not shown that any of these men ever worked more than eleven hours overtime" (R. 164), respondent's payroll records show that the engineers sometimes worked as many as 59½ hours a week. Neither during those long weeks nor during the occasional weeks when they worked 42½ or 33½ hours did their monthly compensation deviate from the agreed monthly salary except for the payment of the "straight-time overtime" for hours between 49 and 53, and later 46 and 53. Had the 80-cent rate or any other hourly rate been used to calculate the regular and overtime compensation of the engineers, the amounts paid to them would have varied in accordance with those rates when the hours deviated from the regularly scheduled workweek.

The record not only fails to disclose any rate upon which a theory of compliance with the Act's overtime requirements may be premised, but, on the contrary, affirmatively establishes that statutory overtime was not paid. As we

[19] ($0.80×40 hours)+($1.20×6 hours)=$39.20 per week
($39.20×52 weeks)÷12 months=$169.87 per month.

have seen, the only rates of compensation found by the district court to be in effect at the time of suit were the monthly salaries and "straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 146–147).[20] And respondent's own payroll records for 1944 demonstrate that, if any hourly rate was paid to any of the engineers during that time, it was the straight-time rate of $1.054 which respondent obtained by dividing their salary by the number of hours for which it was paid. This is precisely the method which the Government contends should have been used to determine the regular rate for purposes of computing overtime compensation under Section 7 of the Act.[21] As we have

[20] Respondent attempts to explain this "straight-time overtime" as "simply a fiction resorted to by the Salary Stabilization Unit to avoid the necessity of approving basic increases which might exceed the 'Little-Steel Formula' used by the President during the war to hold wage and salary increases to a ceiling of 15% above the levels of 1941" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 9). Whatever the reason for the adoption of this method of compensation, it was obviously inconsistent with the payment of time-and-a-half for hours in excess of the statutory workweek. That this arrangement neither provided for nor even contemplated the payment of statutory overtime compensation is made clear by the district court's finding that it was specifically approved by the Treasury "as a salary increase for an exempt employee under the Fair Labor Standards Act" (R. 146–147).

[21] This is the proper method for determining the "regular rate" where the parties agree as to the hours to be worked for the particular salary. When the agreement is for flex-

seen, however, statutory overtime was never paid on this rate.

Thus, as found by the district court and demonstrated by respondent's payroll records, the engineers were paid at the time of suit a flat salary for any number of hours up to 46, a rate officially designated "straight-time" for hours from 46 to 53, and nothing additional for the occasional work in excess of 53 hours in a workweek. At no time since the engineers were placed "on a salary basis" has their compensation been affected by any hourly rate, other than the straight-time rate for hours from 46 (or 49) to 53. The 80-cent rate, considered by the court below to have been their "regular rate of pay," was never "actually paid for the normal, non-overtime workweek" or "used as the basis for calculating the compensation received for overtime labor"; it was "not in fact the regular rate under any normal circumstances." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* at 426. It was therefore error to consider it the regular rate for statutory purposes. *Walling* v. *Helmerich & Payne, supra; Walling* v. *Harnischfeger Corp., supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra.*

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ible hours, the regular rate is obtained by dividing the salary by the hours actually worked in each workweek and may vary from workweek to workweek, as in the *Missel* case. See Interpretative Bulletin No. 4, Wage and Hour Division, U. S. Department of Labor (November 1940), paragraphs 11–12, 1942 W. H. Man. 104, 106–107.

CONCLUSION

For the foregoing reasons the judgment of the circuit court of appeals should be reversed.

Respectfully submitted.

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